NO. 51162-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JUDITH HOFFMAN, as Personal Representative to the Estate of LARRY HOFFMAN,

Appellant,
v.

KETCHIKAN PULP COMPANY,

Respondent.

RESPONSE BRIEF OF RESPONDENT

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I. INTRODUCTION

The introduction section of Mrs. Hoffman's brief displays a profound misunderstanding of the history of this case, and the legal impact of this court's prior remand. That misunderstanding appears to derive from appellant's belief that the court's remand under a CR 12(b)(6) standard is actually a decision on the merits. It is not and cannot be. A reversal based on allegations and the existence of "hypothetical facts" simply sends the case back to the trial court to give the appellant the opportunity to prove those facts.

Under CR 12(b)(6), dismissal is only appropriate if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." In undertaking such an analysis, "a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record." *Tenore v. AT & T Wireless Servs*., 136 Wash.2d 322, 329–30, 962 P.2d 104 (1998); *Burton v. Lehman*, 153 Wash.2d 416, 103 P.3d 1230 Here, the Court of Appeals relied specifically on plaintiff's allegations, "hypothetical facts" and "presumed facts" to support its reversal of the trial court.

> All facts alleged in the complaint are taken as true and we may consider hypothetical facts support the plaintiff's claim. *FutureSelect*, 180 Wn.2d at 962. Therefore, a complaint survives a CR 12(b)(6) motion if *any* (emphasis

> in original) set of facts could exist that would justify recovery. (CP 1170)
>
> Because Hoffman has alleged facts that, if presumed true, show that the exception would apply, his suit is arguably not barred by Alaska's statute of repose. (CP 1174)

The remand simply afforded Mrs. Hoffman an opportunity to prove her allegation of gross negligence with trial admissible evidence. We will see below that her evidence fails to demonstrate even common law negligence. In fact, the history of the case and the legal implications of that history are straight forward and simple.

II. STATEMENT OF THE CASE

A. Trial Court Round One

On March 24, 2014, Plaintiffs Larry and Judith Hoffman filed a complaint for personal injuries against seventeen (17) defendants alleging that exposure to asbestos fibers for which each company was liable substantially contributed to Mr. Larry Hoffman's development of mesothelioma. (CP 1-6) Mr. Hoffman alleged that he was exposed to asbestos containing products while living in "various places" in Alaska from approximately 1960-1980. *Id.* Mr. Hoffman contended that he encountered continuous occupational exposure to asbestos containing products in the State of Alaska from 1970-1980. (CP 44-45; 56-60). Mr. Hoffman did not identify a single exposure that occurred in Washington State. *Id.* The relevant exposure with respect to KPC is from

his father who worked at the KPC mill in Ketchikan from 1954-1966. (CP 679; 858) Mr. Hoffman moved from Alaska to Oregon in approximately 1980. After he retired in 2008, the Hoffmans moved to Tennessee, where they lived until returning to the northwest to be close to Mr. Hoffman's daughters. (CP 1027-28) In 2012, the Hoffmans relocated to Vancouver, WA—approximately one year before Larry Hoffman was diagnosed with mesothelioma. His residence at the time of diagnosis is the only alleged contact with the State of Washington. (CP 862) On March 13, 2015, the Court granted defendants' motion to apply Alaska Law with respect to liability and damages but set aside the issue of the Alaskan Statute of Repose. (CP 1032) At the time of his death, Mr. Hoffman was residing in the State of Florida. (CP 1034)

As of March 24, 2015, four days before commencement of the originally scheduled trial, the only remaining defendants were KPC and General Electric Company ("GE"). (CP 1036-38) On March 24, 2015, the court heard KPC's motion for dismissal pursuant to CR 12(b)(6). Following oral argument, and at Plaintiffs' request, the Court adjourned for the day to allow Plaintiffs to brief whether any of the enumerated exceptions to the Alaskan Statute of Repose applied to either KPC or GE. (CP 1104-1112). The hearing was set to occur on the following day. In giving more time for Plaintiffs to address the applicability of the various

exceptions to the Alaska Statute of repose, the Court noted that, because she would be considering materials outside the pleadings, the motion would be treated "like every other summary judgment…." (CP 1051; 1104-1112) The Verbatim Report of Proceedings ("VRB") for the March 25, 2015 hearing is entitled "Summary Judgment Motions." (CP 1117) Plaintiffs argued that four of the eleven enumerated exceptions to the Alaska Statute of Repose applied to their claims against KPC. (*See generally* CP 1117-1140*)* According to Plaintiffs, since the exceptions barred application of the statute, there was no conflict of laws because neither Washington's nor Alaska's statute of repose would bar their claims. The trail court ruled that (1) the hazardous waste exception did not apply because asbestos is not hazardous waste as that term is defined in the Alaska Statute of Repose; (2) the foreign body for therapeutic or diagnostic purposes exception does not apply because the legislative history makes clear that the exception deals with medical malpractice claims; (3) the defective product exception does not apply because KPC is a mill, not a product; and, (4) the gross negligence exception does not apply because Plaintiffs had not produced any evidence indicating gross negligence on the part of KPC. (CP 1161-63) Because none of the exceptions apply, all claims against KPC were dismissed at summary judgment pursuant to Alaska's general ten year Statute of Repose.

(CP 1161-63) The Alaska Statute of Repose, a general statue of repose[1], barred Plaintiffs' claims as they arose more than ten years from the last date of possible exposure to asbestos from KPC conduct.

B. Court of Appeals Round One

The Hoffmans filed a timely appeal arguing that, because neither state's statutes of repose barred their claims, the trial court erred in dismissing the case under a CR 12(b)(6) standard. Further, Plaintiffs argued that even if there was an actual conflict of law, Washington's Statute of Repose should have applied under choice of law principles. Plaintiffs did not appeal the trial court's ruling that Alaska law applies with respect to liability or damages. KPC responded that there was no error. The Court of Appeals, in an unpublished decision, applied a CR 12(b)(6) standard in reversing the trial court's dismissal of Plaintiffs' claims, even though the trial court clearly did not utilize that standard.[2] The Court of Appeals noted that, "[th]erefore, a complaint survives a CR 12(b)(6) motion if *any* set of facts could exist that would justify recovery." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 963 (1988). The Court of Appeals assumed all Plaintiffs' allegations to be true, including

[1] The Alaska Statute of Repose differs from the Washington Statute of Repose in that it is not limited to causes of action arising out of construction activities. Rather, it is a general statute of repose that applies to all causes of action.

[2] This was likely due to the fact that appellate briefing discussed the motion as one brought initially under 12(b)(6).

hypothetical facts that might support a finding of liability, as is required under a CR 12(b)(6) analysis, and on that basis determined that Mr. Hoffman had made allegations and hypothetical facts could be imagined that could possibly support the conclusion that the gross negligence exception applied to Plaintiffs' claims. (CP 1161-75) Therefore, the Alaska Statute of Repose did not necessarily preclude Plaintiffs' claims under a CR 12(b)(6) standard.

> "All facts alleged in the complaint are taken as true and we may consider hypothetical facts support the plaintiff's claim. *FutureSelect*, 180 Wn.2d at 962. Therefore, a complaint survives a CR 12(b)(6) motion if *any* (emphasis in original) set of facts could exist that would justify recovery." (CP 1170)

The Court of Appeals agreed with the trial court that the defective product exception did not apply to KPC as a matter of law and elected not to address the remaining two exceptions dealing with hazardous waste and medical devices. (CP 1172) Mrs. Hoffman seems to argue in this appeal that the prior reversal by the Court of Appeals was a ruling on the merits. It clearly was not. It simply sent the case back to the trial court to give Plaintiff the opportunity to present evidence to support her claims.

C. Trial Court Round Two

On remand, KPC brought a motion for summary judgment asserting that the Alaska Statute of Repose barred prosecution of

Mrs. Hoffman's claims.[3] (CP 985-1225; 1413-1450) There were no surprises in the briefing or argument. KPC detailed the same arguments and authorities that had prompted Judge van Doornick to dismiss the Hoffmans' claims at summary judgment. Mrs. Hoffman responded with the same arguments she previously made. The single exception was that Mrs. Hoffman argued, as she does here, that the unpublished Court of Appeals decision reversing pursuant to the application of a 12(b)(6) review standard was a decision on the merits. Judge Serko disagreed. KPC's motion for summary judgment was granted. (CP 1451)

Judge van Doornick granted KPC's motion for summary judgment utilizing the standards imposed by CR 56. This Court reversed that decision utilizing a 12(b)(6) standard. Judge Serko again granted KPC's motion for summary judgment utilizing the standards imposed by CR 56. Just as Judge van Doornick was correct in dismissing Mrs. Hoffman's claims by summary judgment, so too was Judge Serko correct in dismissing those claims. This court should affirm.

III. ISSUES PRESENTED FOR REVIEW

Does the Alaska Statute of Repose bar Mrs. Hoffman's claims against KPC?

[3] Mr. Hoffman had passed away in the interim.

IV. ARGUMENT

A. Standard on Summary Judgment

Unlike a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6), a plaintiff's opposition to a CR 56 motion for summary judgment must be supported by admissible evidence. The purpose of summary judgment is to avoid a useless trial, and to test, in advance of trial, whether evidence to sustain the allegations in the complaint actually exists. *Almy v. Kvamme*, 63 Wn.2d 326 (1963); CR 56. Summary judgment must be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56. A defendant may move for summary judgment by asserting that there is an absence of evidence to support one or more essential elements of the plaintiff's claim(s). In response to such a motion, a plaintiff must respond with evidence. *E.g., Young v. Key Pharms, Inc.*, 112 Wn.2d 216, 225 (1989). If the plaintiff lacks competent evidence to support even a single element of her claim, the defendant is entitled to summary judgment because "a complete failure of proof concerning [a single essential] element necessarily renders all other facts immaterial." *Boyce v. West*, 71 Wn. App. 657, 665 (1993).

Appellant's failure to produce evidence that would be admissible at trial supporting the proposition that any of the enumerated exceptions to

the Alaska Statute of Repose apply to her claims mandated summary dismissal of those claims against KPC as a matter of law.

B. Choice of Law

Statutes of repose are to be treated as the state's substantive law in making choice of law determinations. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 212, 875 P.2d 1213 (1994). When a party raises a conflict of laws issue, a court will (1) determine if there is an actual conflict (2) where a conflict of laws exists, apply the most significant relationship test to determine which state's law applies to the case, and (3) apply the chosen substantive law's statute of repose. *Woodward v. Taylor*, 184 Wn.2d 911, 917, 366 P.3d 432 (2016). An actual conflict exists where the result of an issue is different under the laws of the interested states. *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997).

Washington's Contractor statute of repose is restricted to claims arising out of the construction, alteration or repair of improvements to real property. It is specifically intended to apply to contractors. Premises owners are excluded from the protection afforded by the statute. RCW 4.16.300; RCW 4.16.310. The Alaskan statute is not so limited. While the Alaska statute contains a provision related to construction activities, it is not limited to construction activities. Rather, the Alaskan statute applies generally to all personal injury actions. AS 09.10.055. There are clear

conflicts between the statutes. The Washington statute of repose does not preclude Mr. Hoffman's cause of action against KPC. The Alaska statute unequivocally does, unless one of the enumerated exceptions applies. Because none of the exceptions apply in this case, there is an actual conflict of law. *Seizer v. Sessions*, 132 Wn.2d 642, 649-50, 940 P.2d 261 (1997).

C. Alaska Statute of Repose

The alleged common law negligence on the part of KPC occurred from 1954 through 1966, when Mr. Hoffman's father worked at the KPC mill in Ketchikan. (CP 1230-31) Appellant alleges that her husband's father Doyle Hoffman carried asbestos fibers home from his work as a welder at the mill, thereby secondarily exposing Larry Hoffman to asbestos. Appellant further claims this "take-home" exposure was a significant factor in the development of Mr. Larry Hoffman's mesothelioma. Those common law negligence claims are barred by Alaska's statute of repose. AS 09.10.055 provides:

> (a) … **a person may not bring an action for personal injury, death, or property damage unless commenced within 10 years of the earlier of the date of**
>
> (1) substantial completion of the construction alleged to have caused the personal injury, death, or property damage; . . .**OR**
>
> (2) **the last act alleged to have caused the personal injury, death, or property damage.**
>
> (b) This section does not apply if

(1) the personal injury, death or property damage resulted from
  (A) prolonged exposure to hazardous waste;
  (B) an intentional act or gross negligence;
  (C) fraud or misrepresentation;
  (D) breach of an express warranty or guarantee;
  (E) a defective product; … or
  (F) breach of trust or fiduciary duty;
(2) the facts that would give notice of a potential cause of action are intentionally concealed;
(3) a shorter period of time for bringing the action is imposed under another provision of law;
(4) the provisions of this section are waived by contract; or
(5) the facts that would constitute accrual of a cause of action of a minor are not discoverable in the exercise of reasonable care by the minor's parent or guardian.

(c) The limitation imposed under (a) of this section is tolled during any period in which there exists the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on the presence of the foreign body.

AS 09.10.055 (emphasis added).

Appellant argued to the trial court and the Court of Appeals that four of the above exceptions applied to her claims against KPC. The Court of Appeals held that the defective product exception does not apply to KPC, which is a premises owner that produced pulp products from trees logged in the Tongass National Forest. (CP 1173) As Judge van Doorninck and Judge Serko have previously ruled, none of the remaining three exceptions are applicable.

1. Exception for Prolonged Exposure to Hazardous Waste Exception Does Not Provide Safe Harbor for Appellant

Appellant argues that the clothing which Mr. Doyle Hoffman wore back and forth between his home and work at the Ketchikan mill constitutes "hazardous waste" as the term is used in the hazardous waste exclusion to the Alaska Statute of Repose. Nothing in the legislative history or the plain language of the statute supports such a bizarre interpretation. Simply put, "waste", as it is defined in the statute, is consistent with the common definition and understanding of the word. It means something intentionally discarded or released into the environment. It does not include clothing worn to work and laundered at home. That commonly understood definition is the precise definition adopted by the Alaska legislature when it defined "hazardous waste" in related statutes.

Moreover, Appellant has presented no evidence that Mr. Doyle Hoffman's clothing could even qualify as "asbestos containing material" under Alaska statutes or regulations.[4] Alaska relies on a specific federal regulation for its statutory definition of "hazardous waste." That specific regulation is 40 CFR Part 261. 40 CFR Part 261 does not include asbestos

[4] To qualify as an asbestos containing material ("ACM"), a material must contain at least 1% asbestos. Regulated asbestos containing material (RACM) requires the additional component of friability. https://dec.alaska.gov/eh/solid-waste/asbestos/. Plaintiff has offered nothing to support the proposition that Mr. Hoffman's clothing contained more than 1% asbestos or was "friable".

in its definition of hazardous waste.[5] Finally, and most importantly, the State of Alaska's regulations governing waste disposal makes it clear that asbestos containing waste is not "hazardous waste" but rather, occupies its own specific regulatory category defined as "regulated asbestos containing material."

a. Mr. Doyle Hoffman's Clothing Is Not Hazardous Waste Under Alaska Statutes or Regulations

The Alaska Legislature in 18 AAC 62.020 adopted by reference the "[r]egulations of the federal government for identification and listing of hazardous wastes, promulgated and published as 40 C.F.R. Part 261…." 40 CFR Part 261 deals with the disposal of solid waste. Under the regulation, "hazardous waste" is simply a sub-category of "solid waste".

Part 261.2 defines solid waste as "any discarded material" not meeting certain exemptions not applicable here. Part 261.3 defines "hazardous waste" as any "solid waste" which exhibits any of the characteristics of hazardous waste identified in Subpart C of Part 261. Mr. Hoffman's clothing cannot be "solid waste" as the term is defined in Part 261 because it is not "discarded material". If that clothing is not a "solid waste" under the Part 261, it cannot be a "hazardous waste" under Part 261. If Mr. Hoffman's clothing is not a "hazardous waste" under Part 261, it cannot be a "hazardous waste" under the statute of repose

[5] 40 CFR 261; 18 AAC 62.020.

hazardous waste exclusion because Alaska law relies exclusively on Part 261 for its definition of "hazardous waste." The primary defining criteria that "hazardous waste" must be a "discarded material" cannot be satisfied.

Second, asbestos is not identified or listed as a hazardous waste in 40 C.F.R. Part 261. In fact, the word "asbestos" does not appear at all in Part 261. Part 261 defines "hazardous waste" as a "solid waste" that exhibits the "characteristics of hazardous waste identified in Subpart C of this Part". Part 261 Subpart C is comprised of 40 CFR Part 261.20 to 261.24. Those sections identify 4 characteristics of hazardous waste: ignitability, corrosivity, reactivity or toxicity. The only possible characteristic applicable to asbestos is toxicity. However, under the regulations, "toxicity" has a specific definition that does not include asbestos.

> **§261.24 Toxicity characteristic:**
>
> (a) A solid waste (except manufactured gas plant waste) exhibits the characteristic of toxicity if, . . . the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table.

Asbestos is not a substance listed in Table 1 to Section 261.24.[6]

[6] Table 1 is set out in Appendix A to this brief.

b. Alaska Regulations Do Not Treat Asbestos Containing Waste as Hazardous Waste

A review of the Alaska regulatory scheme dealing with hazardous waste and asbestos yields the same result because asbestos containing materials are not classified as a hazardous waste under Alaska law. Alaska Administrative Code (AAC) Title 18 regulates waste disposal in Alaska. 18 AAC Chapter 60 deals with solid waste management, including disposal. Under 18 AAC Section 60, there are separate provisions for disposal of "hazardous waste"[7] and asbestos containing waste.[8] Under no reading of the statute could it be inferred that "hazardous waste" is the same as "waste containing regulated asbestos containing material".

Asbestos containing material is specifically excluded from the Alaskan definition of hazardous waste. Material containing asbestos occupies a specific, defined place in Alaska's regulatory scheme. It is defined as "Regulated Asbestos Containing Material" or Non-regulated "Asbestos Containing Material." It is nowhere defined as "hazardous waste." Even if by some strange twist of logic, Mr. Hoffman's clothing could be considered "waste", that clothing cannot be "hazardous waste"

[7] 18 AAC 60.020.
[8] 18 AAC 60.450.

under Alaska law.[9] At most, it would be regulated asbestos containing material if the threshold 1% concentration could be demonstrated and the material was shown to be "friable".

The Washington Supreme Court has recognized as a general rule of statutory construction that a term used in one statute is to be interpreted in a fashion consistent with its use in related statutes. *State v. Granath,* 415 P.3d 1179 (2018); *State v. Pettersen,* 190 Wn.2d 92, 401 P.3d 187 (2018).

> "Statutory interpretation is a question of law, subject to de novo review." *City of Spokane v. Spokane County,* 158 Wash.2d 661, 672-73, 146 P.3d 893 (2006). In reading the SSOSA statute, this court's duty is to "give effect to the Legislature's intent." *State v. Elgin,* 118 Wash.2d 551, 555, 825 P.2d 314 (1992). The clearest indication of legislative intent is the language enacted by the legislature itself. *State v. Ervin,* 169 Wash.2d 815, 820, 239 P.3d 354 (2010). Therefore, "if the meaning of a statute is plain on its face, we 'give effect to that plain meaning.' " *Id.* (internal quotation marks omitted) (quoting *State v. Jacobs,* 154 Wash.2d 596, 600, 115 P.3d 281 (2005)). However, we will not read a statute in isolation; we determine its plain meaning by taking into account "the context of the entire act," as well as other related statutes. *Jametsky v. Olsen,* 179 Wash.2d 756, 762, 317 P.3d 1003 (2014).

State v. Pettersen at 98.

The Alaska legislature specifically defined the term "hazardous waste." The same term is used in the Alaska Statute of Repose. Appellant

[9] Ignoring for the purposes of argument that any of those materials qualify as "asbestos containing" under Alaska law.

presents no evidence or legal authority supporting the proposition that the term should not be given the same meaning in both statutes.

Mr. Hoffman's clothing cannot be hazardous waste under Alaska statutes and regulations, by definition. That clothing did not constitute "discarded materials" and, *ergo* cannot be "waste" or "hazardous waste." There has been no proof that Mr. Hoffman's clothing even constitutes "regulated asbestos containing material" under Alaska law, *i.e.*, greater than 1% asbestos by weight. Finally, asbestos is not included in the definition of "hazardous waste" adopted by the Alaska legislature. Mrs. Hoffman's reliance on statutes or regulations not adopted by the State of Alaska for its definition of hazardous waste is not helpful. The citations are irrelevant for the purposes of this inquiry, as are the cases that interpret those statutes and regulations. The State of Alaska does not consider asbestos contaminated clothing worn to work and then home for laundering to be "waste" or "hazardous waste." The exclusion cannot apply under the circumstances present here.

2. The Medical Malpractice Exception Does Not Apply to Appellant's Claims

Alaska's exception for non-therapeutic, non-diagnostic, foreign objects left in an individual's body does not apply to appellant's claims either. The text, context, and legislative history of the exception support

this analysis. Because appellant's claim has nothing to do with negligent surgery, this exception does not apply.

The statute tolls the ten year period while:

> "there exists the undiscovered presence of a foreign body that has no therapeutic or diagnostic purpose or effect in the body of the injured person and the action is based on the presence of the foreign body." AS 09.10.055(c)

When construing statutes, a court must read the statute as a whole, with each term giving context to the other. *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 688 (1992). Here, the words "therapeutic" and "diagnostic" give unmistakable context to the phrase "foreign body": this refers to surgical instruments.

The legislative history of the statute fully supports this reading. One of the main goals of the 1997 legislation was to reduce the cost of malpractice insurance for professionals, most especially including medical professionals. Alaska HB 58, §5 (1997). This exception balances the hard ten-year cap that would otherwise absolve medical professionals of the consequences of difficult to discover medical negligence such as the old sponge left in after surgery.

The chief sponsor of this legislation, Representative Brian Porter, articulated the exact purpose as follows:

> REPRESENTATIVE PORTER referred to Section 5(2)(c), which he described as somewhat unusual, a sticking point

> for which accommodation was made along the way. "The old sponge left in the body after surgery" kept coming up, he said. "We toll the statute of repose. Tolling is a nice legal word for meaning that it's null and void, held in abeyance until this thing is discovered, that if there is a foreign body that has no therapeutic or diagnostic purpose found … in a person's body, that is an exception to the statute of repose."

Minutes, H. Jud. Comm. Hearing on S.S.H.B. 58, 20th Leg. 1st Sess. at No. 1050.

The Alaska Supreme Court has previously given deference to the floor remarks of Representative Porter, as the chief sponsor of this landmark legislation. *Jones v. Bowie Industries, Inc.*, 282 P.3d 316, 338 (2012). The only further comment in the legislative history with respect to the medical exception under Section (5)(c) came on February 24 when a medical doctor was invited to the House Judiciary Committee hearings to address the exception.

> REPRESENTATIVE BERKOWITZ referred to Section 5, subsection (c) on page 4, which tolls the statute of repose upon discovery of a foreign body. It seemed to him that lawyers are trying to out diagnose doctors, and he wondered if there is any other medical procedures that could cause a problem down the road, other than leaving a foreign body inside a human body.
>
> DR. JOHNSON responded that in terms of lurking for years and years, and causing problems, and then all of the sudden being a problem, something that's left as a foreign body, generally if it's going to cause problems, will do so relatively soon. It's mere presence there is an affront and clearly an error. The reason there is an exception for this type of situation isn't that it will somehow lay there, and

> then at a later time cause a problem. If it is there, by definition it's an error, which needs to be addressed. The degree of injury created by it is another issue, but it's precisely listed in this section as something which isn't covered in a statute of limitations.

Id. at No. 2343 (Feb. 24, 1997).

Not surprisingly, the only record of an Alaskan case which uses the phrase "foreign body" is an unreported case from 2014, dealing with a metal object left in a patient after surgery. *Jones v. Corrections Corp. of America*, 2014 WL 72761 (noted for factual basis rather than legal precedent). Similarly, the only other use of the phrase "foreign body" in Alaskan statutes is in a statute relating to optometrists. AS 08.72.273 (providing that a "licensee may remove superficial foreign bodies from the eye and its appendages").

Comparing Alaska's statute to other statutes around the country shows that this language (a foreign body or object without therapeutic purpose) is used specifically in the context of medical malpractice claims. *See* RCW 4.16.356(3) (medical malpractice statute tolled upon proof of "the presence of a foreign body not intended to have a therapeutic or diagnostic purpose or effect"); Cal. C.C.P. §340.5 (three year medical malpractice statute tolled for "the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect"); New York CPLR §214-a (tolling when the claim is based on the presence of a "foreign object in the

body of the patient"); Mo. St. 516.105 (tolling malpractice claims based on allowing a "foreign object to remain within the body of a living person").[10] This language is clearly and repeatedly used throughout the country to toll medical malpractice claims based on retained objects. Alaska is unique in that it has a general statute of repose, rather than several statutes for various types of action. As such, Alaska's exceptions, although clear in and of themselves, may appear to otherwise lack the context which is consistently apparent: when legislatures refer to "foreign body" claims, they refer to medical malpractice claims. As the legislative history shows, Alaska uses this language for the exact same purpose.

By contrast, when legislatures intend to enact an exception for asbestos related claims, they do not use the phrase "foreign body." They use the word "asbestos." *See, e.g.*, *Travis v. Ziter*, 681 So.2d 1348, 1354 (Ala. 1996) (discussing Alabama's statutory exceptions to repose for "asbestos actions" and "medical malpractice"); *Holmes v. ACandS, Inc.*,

[10] In fact, 22 states have special tolling provisions for malpractice claims relating to "foreign objects", including Arkansas (Ark. Stat. Ann. §16-114-203); California (Cal. Civ. Proc. Code §340.5); Colorado (Colo. Rev. Stat. §13-80-102.5); Georgia (Ga. Code §9-3-70); Idaho (Idaho Code §5-219); Iowa (Iowa Code §614.1); Maine (Me. Rev. Stat. Ann. Tit. 24 §2902); Maryland (Md. Courts & Judicial Proceedings Code §5-109); Massachusetts (Mass. Gen. Laws Ann. Ch. 260 §4 and Ch. 231 §60DD); Mississippi (Miss. Code Ann. §15-1-36); Missouri (Mo. Rev. Stat. §516.105); New York (NY CPLR §§214-a, 208); North Carolina (N.C. Gen. Stat. §§1-15, 1-17); Ohio (Ohio Rev. Code Ann. §2305.113; §2305.16); Pennsylvania (Pa. Stat. tit. 40 §1303.513); South Carolina (S.C. Code Ann. §15-3-545); Tennessee (Tenn. Code Ann. §29-26-116 & §28-1-106); Utah (Utah Code Ann. §78B-3-404); Vermont (Vt. Stat. Ann. Tit. 12, §§521, 551); Virginia (Va. Code §8.01-243 *et seq.*); Washington (RCW §4.16.350 & §4.16.190); and Wisconsin (Wis. Stat. §§ 893.55, 893.56).

711 NE2d 1289, 1290 (Ind. Ct.App. 1999) (discussing Indiana's "asbestos exception" to its repose statute); *Ripley v. Tolbert*, 260 Kan. 491, 921 P.2d 1210, 1219 (1996) (discussing Kansas's "latent disease exception" which expressly mentions asbestos); *Rose v. Fox Pool Corp.*, 335 Md. 351, 643 A.2d 906, 914-15 (1994) (discussing the exception for "asbestos-related diseases"); *Spilker v. City of Lincoln*, 238 Neb. 188, 469 N.W.3d 546 (1991) (discussing exception for "injuries arising from exposure to asbestos"); *Wyatt v. A Best Prods. Co.*, 924 SW2d 98, 103 (Tenn. Ct. App. 1995) (discussing Tennessee's "asbestos" exception to the repose statute); Or. Rev. Stat. 30.907 (special statute for "asbestos-related disease"); Cal. Code of Civ. Proc. §340.2 (special rules for injuries based on exposure to asbestos). Alaska's legislature did not use the word "asbestos" in any of the exceptions to the statute of repose. This court must conclude that it did not intend to enact a special exception for asbestos-related diseases.

3. Appellant's Constitutional Challenge Has Been Rejected by Both the Washington Supreme Court and the Alaska Supreme Court

Both the State of Alaska and the State of Washington have adopted statutes of repose. Although the statutes differ in scope, the fundamental operation of the respective statutes is identical. They both eliminate causes of action. Application of the statutes may eliminate a cause of

action before it accrues.[11] It is this feature of the Alaska Statute of Repose that Mrs. Hoffman challenges as unconstitutional. That argument has been rejected by both the Washington Supreme Court and the Alaska Supreme Court.[12] It must, likewise, be rejected by this court.

The Washington Supreme Court rejected both equal protection and due process objections to the Washington statute in *Lakeview Blvd. Condo. Ass'n. v. Apartment Sales Corp.*, 144 Wn.2d 570, 29 P.3d 1249 (2001).

> We conclude that RCW 4.16.310 does not violate either the federal or state constitutions. The Association has failed to show that RCW 4.16.310 violates the equal protection clause because the classifications created by the statute bear a rational relationship to the purposes of the statute. We recognize that the legislature has broad power to enact laws to benefit society, and we have generally shown deference to the decisions of the legislature, except where the legislature has acted in an arbitrary or discriminatory manner. Similarly, we recognize that the legislature has broad authority under the police power to pass laws, like statutes of limitation and repose, that tend to promote the public welfare. Because the legislature may alter or restrict a common law right without foreclosing that right, we decline to determine whether a right to a remedy is implied by the language of article I, section 10 of the state constitution.

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[11] *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419, 150 P.3d 545 (2007); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1068-1069 (2002).

[12] *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.* (1972) 81 Wash.2d 528, 503 P.2d 108; *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1068-1069 (2002).

The Alaska Supreme Court rejected the same arguments in *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1068-1069 (2002).

> The plaintiffs offer two arguments to challenge the constitutionality of the statute of repose: (1) the statute violates equal protection; and (2) the statute violates due process because it overturns the "discovery rule." These arguments will be discussed in turn. . . .
>
> For the reasons stated above, we reject the plaintiffs' facial challenges and hold that the challenged provisions of chapter 26, SLA 1997 are facially constitutional under the Alaska and United States Constitutions.139 We therefore AFFIRM the superior court's decision as to all elements of chapter 26, SLA 1997.

Appellant raises no new arguments in support of her claim that the Alaska statute is unconstitutional. Indeed, it seems odd that Appellant would ask the Washington Court of Appeals to find an Alaska statute unconstitutional when the Alaska Supreme Court has deemed it constitutional. Under RCW 5.24.010, "[E]very court of this state shall take judicial notice of the Constitution, common law, civil law, and statutes of every state, territory and other jurisdiction of the United States." The constitutional, common law and statutory interpretation of a statute of another state is binding on a Washington court when interpreting that statute.

4. Appellant's Argument Is Procedurally Defective

A court should not shy away from applying a statute simply because a party asserts that it may "raise serious constitutional issues" to

do so. Instead, it should consider the properly raised constitutional issues and address them. If a full argument is made, and is persuasive, then perhaps the court might apply the statutory construction maxim which directs it to avoid constitutional issues. But here, no constitutional issues are properly raised. Mrs. Hoffman does not make a serious argument about the supposed due process violation. An argument that a statute violates due process as-applied requires an in-depth analysis that, at a minimum, identifies the relevant factors and balances them appropriately in light of the categorization of the factors. *Sands ex rel Sands v. Green*, 156 P.3d 1130, 1134 (2007). Thus, a plaintiff arguing that a due process violation has occurred must (1) identify the private interests allegedly violated, (2) identify the risk of an erroneous deprivation of that interest, and (3) identify the government's interest, including the fiscal and administrative burdens that additional or substitute requirements would entail. *Id.* Plaintiff must then identify the reasons why, under the particular standard of review, the balance of interest weighs in his favor.

Mrs. Hoffman's argument does none of this. Instead, she simply points to an Alaskan case which held that a different statute was unconstitutional, then argues that the statute of repose at issue here is unconstitutional because some categories of plaintiffs would not be able to

sue some categories of defendants. This argument is but a sketch of what a full due process argument should be.

Merely *sketching out* a constitutional argument is insufficient to implicate the statutory interpretation rule appellant wishes to trigger. Especially where, as here, Alaska's courts have already directly held that this specific statute *is* facially constitutional. *Evans ex rel. Kutch v. State, supra*. The court in *Evans* specifically considered Mrs. Hoffman's argument: that some causes of action might be lost before even being discovered. *Id.* It specifically held that, even if that happened, there would be no violation of Alaska's constitutional guarantees of equal protection and due process.

The goals of the 1997 legislation of which the ten-year statue of repose is a part are all legitimate public purposes. *Id.* at 1053. Alaska's legislature has the power to change the traditional common law elements of claims, just as it has done here. *Id.* at 1050. The Court has even determined that foreclosing some litigants from bringing claims is a permissible feature of a statute. *Id.* at 1050. Here, the legislature intended to shorten and even bar some litigation and claims. Alaska HB 58, §1(1) (1997). This statute does exactly that, and in a constitutional manner.

If Appellant were to at least have made a complete due process argument for the as-applied unconstitutionality of the statute, then this

court could consider construing the statute of repose so as to avoid that unconstitutionality, if possible. But she does not make that argument. Instead, Mrs. Hoffman would like this court to jump at the shadow of a *potential* issue whose parameters have not even been briefed. In the face of clear Alaskan precedent upholding the constitutionality of this specific statute against the precise challenge made here, this court should reject Appellant's argument.

5. The Intentional Act or Gross Negligence Exception Does Not Preserve Appellant's Cause of Action

a. Legal Standard

The best evidence of what Mrs. Hoffman's counsel believes her cause of action is against KPC is Plaintiff's Third Amended Complaint for Personal Injuries. (CP 978-84). Despite filing 3 different complaints, no claim has ever been asserted by Mrs. Hoffman for gross negligence. (CP 978-84; 1-6;10-15) The omission is understandable. There is absolutely no evidence of gross negligence to support a hypothetical claim. Judge van Doornick specifically noted during the course of the initial summary judgment hearing that: "there's [no] evidence to indicate that there is gross negligence." (CP 1163) During oral argument and in the briefing to the court for this initial motion, Mrs. Hoffman's trial counsel repeatedly asserted its claims against KPC were "common law negligence" claims. "I want to make it clear to the Court, we are pursuing

a common law negligence claim against Ketchikan … we claim Ketchikan knew or should have known of this risk." (CP 1043) ". . . the language [of the statute] creates an ambiguity that needs to be resolved in favor of maintaining common law negligence rights," (CP 1045) Plaintiff's briefing in the trial court repeatedly referenced this knew or should have known standard. *See, e.g.,* CP 914 describing KPC' conduct as "negligent".

AS 09.10.055 does not define "gross negligence."[13] However, there is authority from which a definition can be derived. *Storrs v. Lutheran Hosps. & Homes Soc'y of America, Inc.*, 661 P.2d 632 *(Alaska 1983)* was an appeal from an administrative proceeding suspending the medical rights of Dr. Storrs. Dr. Storrs contested the Committee's definition of gross negligence as applied at his hearing. The definition used:

> Gross negligence requires a choice of a course of action either with knowledge of a serious danger to [individuals] involved in it or with knowledge of facts which would disclose this danger to any reasonable [person]. Gross negligence involves a risk substantially greater in amount than that which is necessary to make conduct negligent.

Storrs, 661 P.3d at 634.

[13] In this counsel's review of Alaska case law, there is not a single personal injury action wherein the court defines the term gross negligence.

The court held that since the Committee employed the Restatement (Second) of Torts definition of reckless disregard, which may be stricter than gross negligence, it was an appropriate definition. *Id.* Gross negligence is an extreme departure from the failure to use ordinary care or failure to take precautions to cope with a possible or probable danger. *Id.*; AS Pattern Jury Instruction 03.14. Gross negligence requires "a major departure from the standard of care." *Maness v. Daily*, 307 P.3d 894, 905 (Alaska, 2013) *quoting Storrs*.

The only "evidence" Appellant has ever put forth in support of the claim that KPC was grossly negligent is a response to an interrogatory wherein KPC asserted that Mr. Larry Hoffman likely had independent training regarding the hazards of working with asbestos because his union, the United Association of Plumbers and Pipefitters, began discussing potential hazards of prolonged exposure to thermal insulation with their members during the 1950s.[14] (CP 1192) The argument that the knowledge of Mr. Hoffman's union is imputable to KPC and establishes a major deviation from the standard of care or gross negligence on the part of KPC during the time that his father Doyle Hoffman worked at the mill and allegedly carried asbestos fibers home on his clothing is meritless.

[14] Nothing in this reference supports the proposition that the union was aware of a risk of disease from "take home" exposure. That knowledge was not apparent until the mid-1980's. *See discussion infra.*

Mrs. Hoffman has produced not a shred of evidence to suggest that anyone in the entire State of Alaska was even discussing "take-home" exposure to asbestos during the relevant time frame, let alone that anyone recognized the potential for an associated hazard. In fact, the evidence is the opposite.

b. Appellant Cannot Establish a Major Departure from the Standard of Care

(1) Mrs. Hoffman's Experts Agree There Was No Known Risk in 1966

Appellant's own expert testimony proves the gross negligence exception does not apply. The record demonstrates that Dr. Castleman, Mrs. Hoffman's "state of the art" expert doesn't have a clue what was known or should have been known in Ketchikan, Alaska as of 1966.

> Q: Have you ever done any research related to the State of Alaska and its history of health and safety practices?
>
> A: No, I haven't.

Deposition of Barry Castleman at 23:24-24:2. (CP 1206)

> Q: Would it be your expectation that in 1971, a state like the State of Alaska would be specifying the use of asbestos in construction projects?
>
> A: Well, I wouldn't be surprised if they were.[15]

Id. at 25:4-6, 25:7-8.

[15] In fact, the State of Alaska specified the use of asbestos containing products in the construction new State owned buildings in the capitol Juneau in 1971. (CP 1428-29; 1431; 1434-35; 1438-39)

A: "I know practically nothing about what the State of Alaska actually did. I haven't conducted any kind of investigations or have any professional experience with the governmental agencies of the State of Alaska…"

Id. at 30:8-13.

Dr. Castleman cannot offer this Court any evidence to support an argument that operators of a pulp mill (consumers of asbestos products) in Ketchikan, Alaska knew prior to 1966 that secondary or household exposure to worker's clothing could cause an increased risk in the development of mesothelioma. Moreover, Dr. Castleman's own writings clearly establish that there was no known risk resulting from take-home exposure to asbestos during the years that Doyle Hoffman worked at the mill. In 1973, the pre-Ph.D., Mr. Castleman authored a paper with Albert Fritsch entitled *Asbestos and You* for the Center for Science in the Public Interest. (CP 1209; 1214)

Castleman's paper reflects what he believed was known or knowable as of 1973, **seven years after** Mr. Hoffman's exposure to his father's clothing ended. Castleman points out that,

> "[t]he existence of primary mesothelial tumors of the pleura, peritoneum and pericardium has been a matter of dispute until very recent times." In fact, mesothelioma was not associated to asbestos exposure until the late 1950s.
>
> (CP 1212)

As noted by Mr. Castleman, as late as 1960, Drs. Willis and Hinson maintained that mesotheliomas were metastatic cancers from undetected primary sites. *Id*. Even after the association between asbestos and mesothelioma was generally accepted by the scientific community, it was thought that only one type of fiber, crocidolite, was causative of the disease. (CP 1213) While that view was expanded to include amosite throughout the 1960s, all the scientific research was targeted toward extremely high exposure level occupations such as miners or millers, and later asbestos insulation workers. Mr. Castleman's research as of 1973 led him to inform his readers that there was no known risk of mesothelioma from take-home or environmental exposures.

> Associations of family or neighborhood exposure should be viewed with caution, according to Selikoff, as often there is a short but forgotten period of employment in an asbestos plant. Relatives of workers and those who live near asbestos plants would know when openings existed and may have worked for a month or so when their own trade was slow. Selikoff and Hammond concluded that no quantitive conclusions will be available regarding the dose-response relationship will be available without epidemiological studies with indirect occupational exposure and environmental exposure….
>
> (CP 1214)[16]

[16] Larry Hoffman alleged that he had direct, continuous, primary and bystander exposure to asbestos containing products while working as a pipefitter from 1970 through 1980. *See* CP 1017-1021; 247-251

Dr. Irving Selikoff, the leading asbestos researcher of the day in the U.S.[17], publicly harbored doubts about the exposure histories of those claiming to have developed mesothelioma from "take home" exposure. Dr. Selikoff was asked point-blank by a union member if his family had reason for concern. To that inquiry, Dr. Selikoff responded that the preliminary data from his own work on the subject was "reassuring." That exchange took place in the Fall of 1971, five years after Mr. Hoffman left the family home. (CP 1216-17)

When the leading US asbestos disease researcher is telling asbestos workers in 1971 that there is no known risk of developing mesothelioma from take-home exposure, it simply cannot be said that a pulp mill in Ketchikan, Alaska, was grossly negligent for failing to warn of a then unknown associated hazard. As explained by Mr. William Ewing, Mrs. Hoffman's expert Certified Industrial Hygienist, the first publication remotely related to the issue of take-home exposure was Kilburn's paper published in 1985, almost 20 years after Mr. Hoffman left the family home.[18] (CP 1220; 1222-1225)

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[17] And upon whose research Mr. Castleman was relying.

[18] Kilburn, et al, *Asbestos Disease in Family Contacts of Shipyard Workers,* Am. J. Pub. Health, June 1985 Vol. 75 No. 6, Pages 615-17. The Kilburn paper does not discuss mesothelioma among sons of shipyard workers at all. It purports to identify "asbestosis" among sons of shipyard workers although only 1 of 79 individuals examined met the 1985 American Thoracic Society definition of asbestosis. (CP 1222-1225)

(2) No Public Information Identifying Risk in 1966

In 1966, there was not a single Alaskan statute regulating the use of asbestos. OSHA was not in existence. Five years after Larry Hoffman's father retired, OSHA declared to the world that the safe level of exposure to asbestos fell somewhere between a 5 f/cc TWA and a 2 f/cc TWA. (CP 299) There was no literature and is no literature, even today, supporting the proposition that take-home exposures could have exceeded OSHA's declared safe exposure level. Mrs. Hoffman has not presented such evidence. More to the point, there is nothing in the literature to suggest that take home exposure from a welder (such as Doyle Hoffman) would have exceeded OSHA's stated safe level of exposure and appellant cannot produce evidence that it did. The initial OSHA regulations established a 12 f/cc PEL[19] in May 1971.[20] The permissible level was then reduced in December 1971 to 5 f/cc.[21] There is simply no basis to conclude that the medical and scientific community recognized a risk of mesothelioma from take home exposures from a welder at the time Mr. Hoffman senior was an employee of Ketchikan Pulp. Mrs. Hoffman has no controverting evidence.

[19] PEL is the permitted exposure level under OSHA regulations calculated on an 8 hour TWA.
[20] 36 FR 10466.
[21] 36 FR 23207.

Gross negligence has not been pled. There is no evidence in the record to support such a claim. Appellant's counsel, in briefing and in open court stated unequivocally that his client's cause of action against KPC sounded in common law negligence. The trial court properly held that, as a matter of law, the exception did not apply because appellant's evidence did not support a finding of gross negligence. To raise the issue of gross negligence to a jury, there must be substantial evidence of the claim. *Boyce v. West*, 71 Wn.App. 657, 666, 862 P.2d 592 (1993). Here, there is no material issue of fact as to the existence of ordinary negligence, much less gross negligence. Allegations and argument are insufficient to establish a gross negligence claim. The testimony of Appellant's experts does not and available documentary evidence cannot support even a common law negligence claim. Simply put, KPC had no reason to believe that Mr. Hoffman was at risk of developing mesothelioma from alleged exposure to his father's work clothes prior to 1966.

V. CONCLUSION

Appellant has a common law claim against KPC for Larry Hoffman's alleged take-home exposures to asbestos during the time that his father worked at the mill, from 1954-1966 (when Larry Hoffman moved out of the house). Those claims are barred by the Alaskan Statute of Repose. None of the exceptions to the statute apply to Appellant's

claims. The decisions of two experienced Pierce County jurists should be affirmed.

RESPECTFULLY SUBMITTED this 29th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on August 29, 2018, I caused a true and correct copy of the foregoing document, "Response Brief of Respondent," to be delivered via email and the Court of Appeals Efiling System to the following counsel of record:

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DATED this 29th day of August, 2018, at Seattle, Washington.

Sandra V. Brown, Legal Assistant

NO. 51162-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JUDITH HOFFMAN, as Personal Representative to the Estate of LARRY HOFFMAN,

Appellant,
v.

KETCHIKAN PULP COMPANY,

Respondent.

APPENDIX A

TO
RESPONSE BRIEF OF RESPONDENT

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APPENDIX A

§ 261.24 Toxicity characteristic.

(a) A solid waste (except manufactured gas plant waste) exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure, test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter, the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering using the methodology outlined in Method 1311, is considered to be the extract for the purpose of this section.

(b) A solid waste that exhibits the characteristic of toxicity has the EPA Hazardous Waste Number specified in Table 1 which corresponds to the toxic contaminant causing it to be hazardous.

TABLE 1 - MAXIMUM CONCENTRATION OF CONTAMINANTS FOR THE TOXICITY CHARACTERISTIC

EPA HW No. [1]	Contaminant	CAeS No. [2]	Regulatory Level (mg/L)
D004	Arsenic	7440-38-2	5.0
D005	Barium	7440-39-3	100.0
D018	Benzene	71-43-2	0.5
D006	Cadmium	7440-43-9	1.0
D019	Carbon tetrachloride	56-23-5	0.5
D020	Chlordane	57-74-9	0.03
D021	Chlorobenzene	108-90-7	100.0
D022	Chloroform	67-66-3	6.0
D007	Chromium	7440-47-3	5.0
D023	o-Cresol	95-48-7	[4] 200.0
D024	m-Cresol	108-39-4	[4] 200.0

EPA HW No. [1]	Contaminant	CAeS No. [2]	Regulatory Level (mg/L)
D025	p-Cresol	106-44-5	[4] 200.0
D026	Cresol		[4] 200.0
D016	2,4-D	94-75-7	10.0
D027	1,4-Dichlorobenzene	106-46-7	7.5
D028	1,2-Dichloroethane	107-06-2	0.5
D029	1,1-Dichloroethylene	75-35-4	0.7
D030	2,4-Dinitrotoluene	121-14-2	[3] 0.13
D012	Endrin	72-20-8	0.02
D031	Heptachlor (and its epoxide)	76-44-8	0.008
D032	Hexachlorobenzene	118-74-1	[3] 0.13
D033	Hexachlorobutadiene	87-68-3	0.5
D034	Hexachloroethane	67-72-1	3.0
D008	Lead	7439-92-1	5.0
D013	Lindane	58-89-9	0.4
D009	Mercury	7439-97-6	0.2
D014	Methoxychlor	72-43-5	10.0
D035	Methyl ethyl ketone	78-93-3	200.0
D036	Nitrobenzene	98-95-3	2.0
D037	Pentachlorophenol	87-86-5	100.0
D038	Pyridine	110-86-1	[3] 5.0
D010	Selenium	7782-49-2	1.0

EPA HW No. [1]	Contaminant	CAeS No. [2]	Regulatory Level (mg/L)
D011	Silver	7440-22-4	5.0
D039	Tetrachloroethylene	127-18-4	0.7
D015	Toxaphene	8001-35-2	0.5
D040	Trichloroethylene	79-01-6	0.5
D041	2,4,5-Trichlorophenol	95-95-4	400.0
D042	2,4,6-Trichlorophenol	88-06-2	2.0
D017	2,4,5-TP (Silvex)	93-72-1	1.0
D043	Vinyl chloride	75-01-4	0.2

1 Hazardous waste number.

2 Chemical abstracts service number.

3 Quantitation limit is greater than the calculated regulatory level. The quantitation limit therefore becomes the regulatory level.

4 If o-, m-, and p-Cresol concentrations cannot be differentiated, the total cresol (D026) concentration is used. The regulatory level of total cresol is 200 mg/l.

[55 FR 11862, Mar. 29, 1990, as amended at 55 FR 22684, June 1, 1990; 55 FR 26987, June 29, 1990; 58 FR 46049, Aug. 31, 1993; 67 FR 11254, Mar. 13, 2002; 71 FR 40259, July 14, 2006]

WILLIAMS KASTNER & GIBBS

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